IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 17 of 1996
in
COMPANY APPLICATIONNo 36 of 1978
with
CIVIL APPLICATION No 28 of 1996

and

O.J.APPEAL No 18 of 1996
in
COMPANY APPLICATIONNo 185 of 1995
with
CIVIL APPLICATION No 29 of 1996

and

OJ APPEAL NO. 19 OF 1996
IN
COMPANY APPLICATION NO. 205 OF 1995
WITH
OJ CIVIL APPLICATION NO. 30 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BANK OF MAHARASHTRA

Versus

O.L. OF NAVJIVAN TRADING FINANCE PVT.LTD.

Appearance:

1. O.J.APPEAL No. 17 of 1996

MR HV CHHATRAPATI for
Petitioner MR RAJNI H MEHTA for Respondent No. 1

2. O.J.APPEAL No. 18 of 1996
MR HV CHHATRAPATI for Petitioner
MR RAJNI H MEHTA for Respondent No. 1

3. CIVIL APPLICATIONNo 29 of 1996
MR HV CHHATRAPATI for Petitioner
MR RAJNI H MEHTA for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE
Date of decision: 02/12/98

ORAL JUDGEMENT

1. As will be presently noticed all the three appeals are inter connected relating to same transaction between the company in liquidation and the Bank of Maharashtra and end relief claimed are integrally interdependent, we have heard and propose to decide them simultaneously by a common order.

2. A winding up order was made on 17.7.77 in Company Petition No. 59 of 1975 for winding up of Navjivan Trading Finance Private Limited, which petition was filed on 8.7.1995 by some creditors of the company. The Bank of Maharashtra is the company's banker with whom the company has multiple dealings. It had 4 different accounts with Gorgeon Branch numbered as 1, 2, 3 and 4. In Account No. 3 of Girgaon branch, company has availed facilities of overdraft. Company had taken out as many as 50 FDRs in the period between March 1975 and July 1976 all prior to the date of order of winding up. Apart from these FDRs, company in various other accounts had small credit balance. The company has during this period utilised 46 FDRs, totalling for a sum of Rs.9,76,000/- by way of security, by pledging the same with the bank for availing overdraft facility, which facility the bank has sanctioned prior to filing of winding up petition in June 1975. Official Liquidator on being appointed Liquidator of the company in liquidation had called upon the bank to deliver to him the said FDRs, for which Company Application No. 146 of 1997 had been moved.

3. In the first instance, in response to that petition, the bank has claimed that it has adjusted amount payable under FDRs against outstanding of the

company under the overdraft account which exceeded the amount payable under the FDRs on 25.8.77. On an issue having been raised that most of the FDRs were pledged after the commencement of winding up proceedings, that is to say with effect from presentation of the winding up petition as envisaged under Section 441 of the Companies Act, 1956 (Hereinafter called the Act of 1956) the said disposition is void unless validated by the court in view of the provisions of Section 536(2) of the Act of 1956, those adjustment entries were reversed and Company Application No. 36 of 1978 was filed by the bank seeking to validate the transaction of pledging of FDRs with the bank as security for repayment of amount payable by company in liquidation under overdraft account. In the alternative, it was also prayed that in any case bank is entitled to set off the amount payable by the bank under the FDRs to the company as its debtor against amount due to it as creditor of the company under overdraft account.

4. The Company Application No. 146 of 1977 was decided on 8.5.79. The application was disposed of with a direction that the entries of adjustment shall be treated as rescinded and in respect of amounts payable under FDRs for one year bearing the date of winding up order shall be issued in the name of Official Liquidator in his capacity as receiver. This direction was made in respect of all the 50 FDRs. The court also directed to issue FDRs in respect of various amounts standing to the credit of the company in different accounts, with the same branch or other branches, in the name of Official Liquidator in his capacity as a receiver. The Official Liquidator was directed to hold the FDRs as receiver, subject to decision of the court in regard to bank's claim and/or lien which is the subject matter of Company Application No. 36 of 1978. We are told that all these FDRs renewed in pursuance of the aforesaid order are in the custody of Registrar of this Court on behalf of receiver.

5. Company Application No. 185 of 1995 was moved by Official Liquidator seeking a direction to the bank to renew the FDRs which have been issued in terms of order made in Company Application No. 146 of 1977 and are lying in custody of Registrar of High Court. The bank raised objection to this prayer by contending that the claim against the bank for principal amount or interest amount on such deposits has already become time barred because no claim or demand was made upon the bank within 3 years from the date of maturity of deposits since last renewals after orders in Company Application No. 146 of 1977. It also relied on its plea under application No.

36 of 1978 to deny its responsibility and obligation to renew the said FDRs any further. In the wake of this application Bank of Maharashtra too filed another Company Application No. 205 of 1995 praying for declaration that the Official Liquidator is not entitled to claim renewal of FDRs as claimed in its Application No. 185 of 1995 and also urged that renewal/encashment in respect of the said FDR from time to time is irrelevant and unnecessary at this stage until Company Application No. 36 of 1978 is decided.

6. All the three aforesaid applications were decided by the learned Company Judge by his common order dated 8.5.1996, by which Company Application No. 36 of 1976 and Company Application No. 205 of 1995 filed by the bank were rejected and Company Application No. 185 of 1995 filed by the Official Liquidator has been allowed. Out of the said order these three appeals have been filed by the Bank of Maharashtra. OJ Appeal No. 17 of 1996 has been filed against order in Company Application No. 36 of 1978. O.J. Appeal No. 18 of 1995 arises out of orders made in Company Application No. 185 of 1995. OJ Appeal No. 19 of 1995 arises out of orders made in Company Application No. 205 of 1995.

O.J. APPEAL NO. 17 OF 1996

7. This appeal is by Bank of Maharashtra against the rejection of Company Application No. 36 of 1978 filed by the appellant in Company Petition No. 59 of 1975 in the matter of Navjivan Trading Finance Pvt. Ltd. (in liquidation) by order dated 8.5.96, passed by learned Company Judge.

8. As noted above, in view of the contention raised in application No. 146 of 1977, it has moved the application No. 36 of 1978 seeking order of the court under Section 536(2) to declare the creation of charge by pledging FDRs in favour of bank valid so that the same can be treated as security held by the Bank for the repayment of overdraft amount recoverable from the company in liquidation. Alternatively, it was prayed that even if the disposition of FDRs in favour of the bank as security is not validated and is deemed to be void, the bank is entitled to adjust the amount payable by it as Company's debtor under the F.D.Rs. or other accounts to the company against the debt recoverable from the company as its creditor under the overdraft account in view of Section 529 of Act of 1956 read with Section 46 of the Provincial Insolvency Act of 1920, which

governs the insolvency law in State of Gujarat, (Hereinafter called the Act of 1920). While deciding the Company Application No. 146 of 1977, the court issued directions to deliver all the FDRs mentioned in the order on application No. 146 of 1977 after renewing the same for a period of one year to the Official Liquidator.

9. The other facts about which there is no dispute and as has been noticed by the learned Company Judge, are that the company in liquidation was carrying on the business of chit funds. For the purpose of its business, it had four current accounts with the Bank of Maharashtra, Girgaon branch known as Accounts Nos. 1, 2, 3 and 4. In respect of Account No.3 for the first time an overdraft facility was sanctioned in June 1975 and overdraft facility was availed from June 1975 onwards. From the other three accounts Nos. 1, 2 and 4, the total amount standing in credit of the company in liquidation was transferred to Account No.3 on or about August 18, 1997 and those other three accounts were closed. Apart from the aforesaid dealings with the Girgaon branch of the Bank the company in liquidation had current account at Chembur branch of the bank, having a credit balance of Rs.6412=19ps. In Fort Branch and in Thakurduar branch, the company was having credit balances of Rs.2608=19ps and Rs.988=56ps respectively. Apart from aforesaid current accounts and 46 FDRs with which we shall presently deal with, the company had 4 FDRs in its name, with Thakurduar branch issued on 15.9.75, 23.6.76, 23.6.76 and 12.7.1976 in the sum of Rs.2500, Rs. 1500, Rs.5000 and Rs.1500 respectively for a period of one year each. The company has availed overdraft facility against the security of fixed deposit receipts for which necessary letters of pledge had been given to the bank by the company (in liquidation). The progressive dealing with the bank by the company (in liquidation) in connection with overdraft account has been noticed in the order under appeal as under:

S.No. Month Deposits Overdraft
1. March 1975 83,000/- Cr. Balance
2. April 1975 1,90,000/- "
3. May 1975 2,80,000/ "
4. June 1975 3,75,000/- Debit Balance
Rs.36,584.66
5. July 1975 4,65,000/- Debit Balance
Rs.2,77,028.54
6. August 1975 5,46,000/- Debit Balance
Rs.6,16,761.36
7. Sept. 1975 6,41,000/- Debit Balance
Rs.5,38,015.64

8. Octo. 1975 7,56,000/- Debit Balance
Rs.7,51,140
9. Nov. 1975 8,41,000/- Debit Balance
Rs.8,85,923.07
10. Dec. 1975 9,06,000/- Debit Balance
Rs.10,33,276.31
11. Jan. 1976 9,76,000/- Debit Balance
Rs.10,04,458.96

10. It has been urged on behalf of the bank that since overdraft facility was sanctioned on a continuing basis prior to the filing of winding up petition, and the company started operation of overdraft account prior to the order of the winding up petition, the same being a continuous account, having come into existence prior to the commencement of winding up proceedings, is not covered under Section 536 and even if it is covered under Section 536, the same having been result of transactions in the ordinary course of business, be validated by the court. Considering this contention, the learned Company Judge observed:

"All overdrafts came to be granted and the debits came to be made only after July 1975. These are the transactions which would fall within the purview of Section 536(2) of the Companies Act, 1956"

Though the court has also noticed that:

"It would become clear that, for the first time, the over draft facility came to be enjoyed by the company in June 1975. This was, of course, prior to the presentation of the winding up petition which came to be presented by the Registrar of the Companies, on July 8, 1975."

11. Another important fact which was noticed by learned company Judge that learned counsel for the bank had urged that all these overdraft money has been paid to various members of the company and therefore it can be said that overdraft facility was obtained and the amounts were received with a view to discharge the liability qua certain members of the company. This fact was not found to be erroneous. However, it is observed that :

"Merely because this amount had gone to some selected members of the company, it cannot be said, only on that basis that, the entire transaction was for the purpose of keeping the company going."

It was further noticed that :

"First Overdraft facility was enjoyed by the company in June 1975, i.e., before a month or so, before the presentation of the winding up petition. The later overdrafts have been taken only after the commencement of the winding up proceedings. It would not lie in the mouth of the Company to say that they were not aware of the commencement of the winding up proceedings before the necessary sanction was given. There was a show cause notice given to the company on August 1, 1973. The company, therefore, knew well as to what was in the offing and they should have known and probably, they were knowing that there has been the commencement of the winding up proceedings against them before the competent court. But, this all has been done with a view to see that the over draft amounts are drawn against the deposits so that their deposits before the bank goes on vanishing slowly and gradually. This device cannot be said to be an honest transaction by the company meant for keeping the company going."

12. The court further noticed taking in view the clause in proforma in the printed form by which the pledge of the FDRs was brought into existence that the FDR deposit with the bank was not only with respect to a particular account but for any other account whatsoever giving the bank a right to set off in other account, vis-a-vis by different deposit receipts.

13. With all these precincts, the learned Company Judge was of the view that the transaction was not with a view to get the company going. The plea for validating the transaction creating a charge in favour of the bank in respect of the FDRs was rejected.

14. The plea on behalf of the bank that it has a lien under Section 171 of the Indian Contract Act was rejected on the ground that the General provisions of the Contract Act cannot have precedence over special provisions of the Companies Act under Section 531 and 536 of the Companies Act.

15. The another plea of the bank that the debt due to the company from the bank under FDRs has become barred by time also did not find favour with the Company Judge.

16. The alternative contention that even if the FDRs cannot be considered to be held by the bank as security for the repayment of amount due from the company (in liquidation) to the bank on overdrafts account, the two being separate accounts between the same parties one resulting in a debt payable to the company and another being debt payable by the company, in respect of the same person, namely, the bank, the same are liable to be set off under Section 529 of the Act of 1956 read with Section 46 of the Act of 1920 is not entitled to recover the same without set off of the two accounts also did not find favour with the learned Company Judge, because of the provisions of Section 531 and 536 of the Companies Act.

17. At the outset we may notice from the schedule of deposits and debts against the securities and deposits as has been detailed in the judgment under appeal, which we have reproduced hereinabove, that until June 1975 the FDRs for amounts of Rs.3,75,000/- had been pledged as security with the bank for providing the company with facilities of overdrafts, withdrawals, though the debt balance until that date was only Rs.36,584.66ps. This was the situation prior to the date of presentation of winding up petition on 7.7.75, that is to say, the pledging of fixed deposit receipts as a security resulting in disposition of property in the FDRs in favour of bank took place prior to the commencement of winding up proceedings and cannot be affected by the provisions of Section 536(2) which reads as under:

> "Section 536(1) xxxxxxxxxx
> 536(2) In the case of a winding up by or subject to the supervision of the court, any disposition of the property (including actionable claims) of the Company and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise directs, be void."

18. The language is plain in itself in declaring only disposition of the property of the Company after the commencement of winding up is to be treated void unless the court otherwise orders. A disposition which has come into existence prior to commencement cannot obviously be hit by the inhibition of Section 536(2). The fact that overdraft account is continued and amount has been withdrawn by the company at later stage would itself not affect a transaction of creating a charge on FDRs as a whole prior to the commencement of winding up

proceedings. According to the facts disclosed in the order under appeal FDRs amount to Rs.3,75,000/- were pledged as security with the bank for any outstanding which the bank may have against the company as on that date or which may come into being on a future date, by availing overdraft facilities. The charge does not come into existence on withdrawal or drawing money from the bank. The charge has come into existence as on the date when the FDRs were pledged. The extent to which this charge can be enforced or can be utilised is a question that depends on the actual sum due ultimately at the time when such charge is to be enforced. The question that because of the very nature of transaction those FDRs were renewed later on would not result in creation of a fresh charge but would only amount to an acknowledgment of existing charge. That also in our opinion cannot be subject matter of inhibition under Section 536(2). Even if it is so, in the facts and circumstances of the case, one cannot find any ground not to validate the same.

19. Coming to the question of effect of winding up proceedings in respect of any charge or security created since July 1975, the creation of a security or charge by pledging the FDRs with the bank undoubtedly amounts to disposition of the FDRs by way of encumbering the same and that being a disposition after commencement of the Act unless validated must be held to be void.

20. The question in the background of controversies raised above have two facets. Treating the same from the point of view as a security, held by the bank, for recovery of debt due to it by the company, if it is not validated will result in losing its character as security and in that event the bank will not be entitled to exercise its right of enforcing a charge or realising its security remaining outside winding up proceedings. However, in losing that status as a security, the amount payable in respect of FDRs by the bank to company would not lose its character as a debt payable by the bank to the company. If, it is a debt payable by the bank to the company, the question which immediately calls for consideration is whether the same is liable to be set off under Section 46 of the Act of 1920 read with Section 529 of the Companies Act against the debt recoverable by the bank from the company.

21. While, the question, whether a disposition which is void under Section 536(2) is to be validated calls for consideration that fundamental object of winding up a company under the supervision of the court is that the assets of the company should be made available for

distribution pari pasu among the creditors of the company and that no creditor should obtain advantage over its other creditors. At the same time, it is also to be kept in view that mere presentation of winding up petition notwithstanding the combined reading of Section 441, which dates the commencement of winding up proceedings with effect from the date of presentation of the petition for winding up and Section 536(2) which declares the disposition by the company after the commencement of winding up proceedings to be void does not stop the company from functioning and continuing with its ordinary business in regular manner. That being the position, in considering the question whether a transaction has to be validated which is void as a result of operation of Section 536(2) read with Section 441 of the Companies Act, the courts have evolved certain principles. Normally a transaction which has been bonafide entered into and completed in the ordinary course of trade must be protected. So also where the disposition is made for the purpose of preserving the business as a going concern, the discretion must be exercised in favour of protecting the transaction. At the same time, merely because the party enters into transaction bonafide by itself may not be sufficient to validate such transaction. If that were so, like Section 531, the Legislature would have provided differently, by declaring only such transactions to be void which are not bonafide. While bonafide requirement of transaction is relevant consideration, it cannot be sole consideration. It should be coupled with ensuring that a company is not to put to a disadvantageous position in disposing its property after the commencement of winding up proceedings to the detriment of general body of creditors for the benefit of transferees only. The principle on which the statute declares the transaction disposing assets of the company since commencement of the proceeding to be void has been succinctly stated by Buckley, J. in the case of Gray's Inn Construction Co. Ltd., In re, (1980) 1 All ER 814:

> "It is a basic concept of our law governing the liquidation of insolvent estates, whether in bankruptcy or under the Companies Act, that the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's unsecured creditors as at that date. In bankruptcy this is achieved by the relation of the trustee's title to the bankrupt's assets back to the commencement of the bankruptcy. In a company's compulsory winding up it is achieved by section 227."

22. Setion 227 of the Companies Act in England corresponds to Section 441 of Indian Companies Act, 1956. The statute in principle applies only to the disposition made by the company of its assets. Section 536(2) cannot have any application to indict transactions of borrowings made by a company ordered to be wound up which has taken place since the commencement of winding up proceedings so as to keep it out of consideration while considering the assets available for free distribution. The borrowings which have been made are liability to be discharged by the company for discharge of which its assets are available as per the provisions of the Companies Act.

23. In this connection, we find that learned company judge has started with the assumption that all overdrafts came to be granted and the debits came to be made only after July 1975. These are the transactions which would fall within the purview of Section 536(2) of the Companies Act, 1956. With great respect, the premise does not appear to be correct. The disposition of assets by the company has been made the subject matter of Section 536(2). The receipt of overdrafts by itself is not a disposition of companies assets by the company in liquidation whose winding up proceedings have commenced. The act of granting loan is the act of bank. The Company's action which comes under Section 536(2) is encumbering the company's assets for acquiring such loans. The act of encumbering company's assets by holding company's assets as security for its repayment may amount to disposition of company's assets. The question has never been raised or even agitated that company is not liable to pay the amounts due under overdraft A/c. to the bank or that the company has not in fact received the overdrafts. The bank's status as a creditor of the company is not at all at issue whose validity was required to be gone into. The question that arose for consideration is whether for the repayment of such overdrafts which have come into existence after the commencement of winding up proceedings if they are void, can the same be validated? That is to say, the question of creation of security should have invited the focus of attention in considering the question of applicability of Section 536(2) and the consequence thereof keeping in view the principles on the basis of which the court were to exercise its discretion to validate the same or not.

24. In this connection, we may also refer to one distinct feature. The company is a chit fund company which collects money from its subscribers continuously for different schemes that is to say it is having a cash

inflow regularly. It also declares under its scheme certain amounts payable to its subscribers which a subscriber becomes entitled on fulfilling the conditions thereof. The cash receipts have to be dealt with in ordinary course of business through the bank by depositing in accounts which the company may be maintaining with the banks and then withdrawing the same from the banks as and when required as per the terms and conditions that has been agreed between the bank and the company. It has been the case of the appellant that overdraft money has been paid to the various members of the company and therefore it can be said that the overdraft facility was obtained for withdrawing the amounts from bank with a view to discharge its liability qua certain members of the company. Instead of directly operating a current account the amounts received were deposited in FDR to earn interest over it for unutilised period and monies were withdrawn from time to time under overdraft account by paying interest on such withdrawals to keep accounts separate. It has been observed in judgment under appeal that merely because this amount had gone to some selected persons of the company, it cannot be said only on that basis that the entire transaction was for the purpose of keeping the company going. This observation at least goes to show that distribution of the amount withdrawn by way of overdraft amongst its subscriber is not a fact in issue. For not accepting such disbursement in ordinary course of business, reference has been made to observation made in the order of winding up of the company that `huge amounts have gone to the directors and their associates by way of loans'. However, there is no finding that amounts in question were utilised for giving loans to directors or their relatives. The finding in order of winding up has been based on accounts prior to commencement of winding up proceedings whereas the overdrafts which fell for consideration were after the commencement of the winding up proceedings.

25. We are concerned here with the transactions of deposits with the bank and withdrawals from the bank from March 1975 to January 1976, a period much after the period which was taken into consideration while making the winding up order. It has been accepted that the company is in receipt of huge amount of cash from its subscribers. If that be so, that amount finding its way to the company by way of fixed deposit or one or other account cannot but be in the ordinary course of business and so far as that part of it is concerned nothing contrary has been found or alleged. If the deposits in question have come out of receipts from the subscribers,

and the amount withdrawn has been held to be distributed among subscribers under the chit fund schemes. We do not see how the observations about the previous conduct of the company with reference to dealing with its funds for disbursing loans to its directors can by itself embellish these transactions to be not bonafide in the ordinary course of business. This is the prima facie conclusion to be reached from the perusal of order under appeal.

26. But as we will see presently that the question whether the transactions are to be transaction for pledging the FDRs with the bank as security for repayments of loan resulting from overdraft facilities need not detain us inasmuch as we are of the view that even if the disposition on FDR's as security for repayments of overdraft facility availed by the company is held to be void and the FDRs are released from its encumbrance as security, the result for the present purposes would not be different.

27. As we have noticed above, that the overdraft facilities obtained by company in liquidation resulted in a debt payable by the company to the bank. The amount due under the fixed deposit receipts which were made with the bank as a result of subscription receipts by the company (in liquidation) is receivable by the company as a debt due from the bank to the company. Such debt as an asset free from encumbrances is a company's asset ordinarily available for distribution amongst its creditors. However, the situation where a creditor of the company also stands as a debtor of the company in the same status, the field is covered by statutory provisions, and that provision makes it incumbent that both the claims are adjusted against each other, and the inter se liability to pay or receive is reduced to one balance.

28. Section 529 of the Companies Act envisages that in the winding up of an insolvent company, the same rule shall prevail and will be observed with regard to debts provable, the valuation of annuities and future and contingent liabilities; and the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

29. This provision clearly brings into operation the provisions of relevant insolvency law governing the individuals in the state in which the company is registered regarding debts provable and the rights of secured and unsecured creditors under such insolvency

law. In the State of Gujarat with which we are concerned, the Provincial Insolvency Act, 1920 applies.

30. Section 34 of the Provincial Insolvency Act, 1920 speaks about debts provable under the Act. It in terms state that all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

31. The date of adjudication in the present case is 17.8.1977. The amount of overdraft to which to the extent the bank is creditor of the company upto January 1976 has been found to be Rs.10,04,458.96ps. This is a date prior to company was adjudged insolvent to be wound up.

32. The learned counsel for the respondent company (in liquidation) has urged that as the overdrafts have been taken after the commencement of proceedings, the same cannot be taken into account. Obviously, it cannot be sustained in view of the clear language of Section 34 of the Provincial Insolvency Act. The relevant date for a debt provable to exist is the date of adjudication, and not the deemed date of commencement of proceedings under Section 441. There is no deeming provision for predating the date of adjudication as an insolvent for the purpose of finding debts provable. Moreover, it not only takes into existence of the existing debts as on the date of adjudication but also all debts and liabilities present or future which the debtor is subjected before his discharge, by reason of any obligation incurred before the date of such adjudication. Thus, it must be assumed that the amounts payable by the company to the appellant bank are the debts provable under the Act, for the purposes of Section 529. Section 45 of the Provincial Insolvency Act confers a right on a creditor to prove a debt which was not payable when the debtor was adjudged as insolvent but if it were payable presently at the time of distribution of dividends can participate in the distribution of dividends, by deducing therefrom the present value of debt by discounting at the rate of 6% per annum.

33. Section 46 relevant for our purposes is reproduced hereinbelow:

"46. Mutual dealings and set-off. - Where there have been mutual dealings between an insolvent

and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

34. Section 46 obviously casts an obligation on the creditor as well as on the insolvent to set off one claim against another claim existing between them on the date of adjudication. The statutory provision has emanated from equitable doctrine of right to set off not only with the object to avoid cross actions but to do substantial justice. It envisages that an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the one party shall be set off against any sum due from the other party and the balance of the account, and NO MORE shall be claimed or paid on either side respectively. The provision has been expressed in most emphatic mandate, without leaving it to discretion of any one. To borrow words of Lord Denning in Cox v. Rolls Razor Ltd. (1967) 1 QB 552 the parties cannot contract out of the statute. Where there are mutual dealings, the statute says that `the balance of the account, and no more shall be claimed or paid on either side. That is an absolute statutory rule which must be observed'.

35. A Division Bench of Lahore High Court explained the principle in Radha Kishen v. Firm of Ganga Ram-Radha Kishen AIR 1914 Lahore 317. A right of set off is a doctrine of equitable jurisdiction and its object is not merely to avoid cross actions, but also to do substantial justice. Therefore this doctrine would apply to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 16 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him.

36. A Division Bench of Calcutta High Court in Krishnachandra v. P. Dhanabhandar Co. AIR 1935 Cal 225 while considering Section 46 of the Provincial Insolvency Act and corresponding Section 47 of Presidency Towns Insolvency Act held:

"Long before the making of statutory provisions on the subject it was the practice in bankruptcy, where there was debtor and creditor account

between the bankrupt and another person, to take the account between them and to adjust the balance, provided that the debts were connected with each other.....The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a pro rata dividend only. S. 46, Provincial Insolvency, Act, and S. 47, Presidency Towns Insolvency Act deal with this matter in the way indicated above."

37. About its effect on the claims in the winding up, the court said:

"We do not also consider that the winding up of the respondent company has any effect on the claim of the appellant and that if he is otherwise entitled to have credit for the moneys paid by or recovered from him, the fact that the company has gone into liquidation would not stand in his way."

38. Situation like the one at hand was before Madras High Court in In re Travancore National Bank Subsidiary Co. Ltd. v. R. Narasimhachari, Official Liquidator AIR 1940 Madras 266. While considering the provisions of Section 229 of the Companies Act, 1913 read with Section 46 of the Provincial Insolvency Act where a creditor in addition to being a creditor simpliciter has obtained a surety was held to have right of set off and a contention to the contrary that because of the surety agreement, the claim of set off cannot be entertained was negated. The Court said:

"The privileges and rights which are given in S. 46, Provincial Insolvency Act, which applies to proceedings under S. 229, Companies Act, are based upon equity and fair dealing. It is recognised that it would be very harsh if the Official Assignee or the Official Liquidator of a Company could demand full money, due by a debtor

and at the same time that person being a creditor for an equal or a larger sum of the company must be content with a dividend dependent on the distribution which can be made from the assets."

39. Referring to the provisions of Order 8, Rule 6 of the C.P.C., the court observed that right of set off is not high because the creditor has obtained surety for repayment of debt due to him.

"The provisions of the above rule are in no way referable to matters arising in insolvency or liquidation and in my view no help is obtained form that rule.....In my view that cannot be. There being moneys which can be set off, this right is not lost when a surety is obtained in respect of the debtor's debt to the company.

40. The principle was succinctly stated in H.Naik Official Liquidator, Puri Bank v. Panchanon Das AIR 1954 Orissa 7. The Court was considering what was the meaning of mutual dealings in Section 46 of the Provincial Insolvency Act in the context of Section 229 of the Companies Act, 1913. Section 229 of the Act of 1913 was corresponding provision to section 536 of the Indian Companies Act, 1956. The case was very much similar to one at hand. It was a case that the respondent had a fixed deposit with the bank and the said respondent was also indebted to the bank on overdraft amount. The bank went in liquidation and the question arose whether in a suit filed by Official Liquidator, the depositor could claim set off, a situation arose quite in the reverse role as has been presented in the present case. Here the depositor has gone in liquidation and bank is the claimant in respect of its overdraft. The Court said:

"Mutual credit or mutual dealings simply mean reciprocal demands which must be naturally terminated in a debt. Where there are reciprocal demands available by one party against the other in the same capacity, it is a clear case in which a set off is a matter of course."

41. The court further held:

"That the case must be taken to be one of mutual dealings between the parties, since there were reciprocal demands, which must in the normal course terminate in a debt owing by one party to the other. The depositor was entitled to a set-off as claimed inasmuch as S.46, Provincial Insolvency Act is applicable to winding up proceedings by

virtue of S.229, Companies Act."

42. A full Bench of the Kerala High Court took the same view of the matter under Section 47 of Kerala Insolvency Act which corresponds to Section 46 of the Provincial Insolvency Act, 1920. The facts in which the question arose were that A had a fixed deposit with the bank. He took certain loan from the bank on a promissory note. Along with the promissory note he also handed over to the bank the fixed deposit receipt with an endorsement of discharge thereon and the delivery and instruction letters containing a direction that on maturity the proceeds of the deposit receipt should be credited to A's loan account. On insolvency of the Bank before the maturity of the fixed deposit, A claimed set off in respect of the proceeds of the fixed deposit against his loan under the promissory note. The contention was raised that because loan had become a secured loan, because of the hypothecation, it was not eligible for set off. The court said:

> "The fact that A handed over to the bank the FDR with an endorsement of discharge thereon, a delivery letter and an instruction letter, amounted to no more than the creation of a charge on the amount covered by the fixed deposit or a hypothecation of that fund. A debt which would have been unsecured, if the promissory note alone was in existence, became a secured debt as a result of that transaction. The existence of such a security did not affect the question of a set off."

43. Pausing here similarity with present case may be noticed with the facts before Orissa as well as Kerala High Courts. The effect of Section 536(2) can be no more than that a disposition of FDR by way of creating hypothecation would fail. None the less, it would not alter the nature of FDR with the bank from an actionable claim owned by the company or a debt owed by the bank to the company (in liquidation) to anything else, or that the overdraft facility enjoyed by the company (in liquidation) resulting in a debt owed by the company (in liquidation) to the bank. The company stood as a debtor of the bank in respect of overdraft account and it stood as a creditor in respect of FDRs, unembelished by the creation of a charge. Section 46 which is a statutory provision governing the case where there are mutual dealings between the insolvent or the company (in liquidation) and its debtor or creditor in the same capacity, the set off must follow.

44. The question again arose before Karnataka High Court in Official Liquidator v. Smt. V. Lakshmikutty (1975) 45 Com cases 679 (Kar) in connection with a chit fund company going in liquidation. The Official Liquidator claimed its dues from the respondent. The respondent who had certain deposits with the company (in liquidation) demanded its set off against dues payable by it to the company. Like present case, the same was refused on the ground that it would amount to a preferential treatment to one of the creditors in applying company's assets and the Official Liquidator is entitled to recover the balance due from the respondent under the chit fund accounts in which they have drawn the amount and in so far as the sums due to them from the company (in liquidation) is concerned from other chit accounts and fixed deposit receipts are concerned they have to prove their claims and claim payment like any other unsecured creditor. The plea was negatived by E.S. Venkataraiah J as he then was. He said referring to Rose v. Hart (1818(129 ER 477:

> "Mutual credit or mutual dealings simply mean reciprocate demands which must naturally terminate in a debt."

He further opined:

> "Section 529 which makes section 46 of the Provincial Insolvency Act applicable does no more than recognise the rights of a debtor under ordinary law. There is no dispute that under ordinary law the respondents could have pleaded the sums due to them by way of set off if suits had been filed before liquidation. The question is whether that right is destroyed by the companies going into liquidation? I do not think so, as there is no provision in the Act which takes away that right."

45. Law in England has too been alike. Section 31 of Bankruptcy Act, 1914 in England is a provision similar to Section 46 which we have under the Act of 1920. Considering that provision in Re. City Life Assurance Company Limited 1925(1) All ER 453, Pollock M.R., said:

> "It is to be observed that S.31 of Bankruptcy Act, 1914, is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, the sums are to be set off and

the balance of the account and no more shall be claimed or paid on either side respectively. It is not merely permissive, it is a direct statutory enactment that the balance only is to be claimed in bankruptcy."

46. What has been stated with reference to bankruptcy law in England which we have referred to above have been approved by Supreme Court in The Official Liquidator of High Court of Karnataka v. Smt. V. Lakshmikutty AIR 1981 SC 1483 while affirming the decision of Karnataka High Court (45 Com. Cases 679). The court quoted with approval, the opinion of Pollock, M.R. referred to above in Re. City Life Assurance case, and said:

"It is true that Section 530 provides for preferential payments, but that provision cannot in any way detract from full effect being given to S.529 and in fact the only way in which these two sections can be reconciled is by reading them together so as to provide that whenever any creditor seeks to prove his debt against the company in liquidation, the rule enacted in Section 46 of the Provincial Insolvency Act should apply and only that amount which is ultimately found due from him at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount due from his should be recovered fully while the amount due to him from the company in liquidation should rank in payment after the preferential claims provided under S.530."

47. To sum up in the winding up of a company, Law of Insolvency apply as regards the rights of the secured and unsecured creditors and debts provable. Where therefore when winding up order is made A has a money claim against the company and the company has a money claim against A, one claim can be set off against the other; an account must be taken and balance only can be proved for.

48. This should have been the end of the controversy in the present case. However, learned counsel for the respondent urged that the aforesaid decisions does not take into account the provisions of Section 531 and 531(A) dealing with fraudulent preference and Section 536 of the Companies Act declaring certain transactions to be void. Ordinarily this plea is not available when the apex court has pronounced upon the mandatory character of any provision of law to argue that some aspect of the same was not considered by it, when the controversy was

the same and there is nothing to suggest that the context was different. However, as will presently notice, we do not find any merit in this distinction either.

49. The contention is raised in the light of claim of the respondent Official Liquidator that the appellant bank should pay what is due under fixed deposit receipt to the company (in liquidation) and should wait for rateable distribution of the realisation of the companies assets for the debt that company owes to it as unsecured creditor standing in que. It was urged that is so because transaction of overdraft is void under Section 536(2) of the Act of 1956. Under the scheme of the Act, if we examine the two transactions on the touchstone of Section 536, we have noticed above that so far as incurring liability or securing loans are concerned by itself does not amount to disposition of the companies assets. If that were so, the contention would be that the loan transaction being void, no amount is payable. This result on the face of its cannot be accepted. Even that is not the suggestion that no amount is payable by the company to the Bank. The fact that request is to stand in que, is acceptance of liability to pay. The direct consequence of argument to raise plea of Section 536 with reference to overdrafts is even to negate the existence of such debt. It cannot be accepted that the debt is existing for rateable distribution, but is non -existent for set off under Section 46 notwithstanding, statutory mandate. For the sake of argument even if the transaction is assumed to be considered void, under the provisions of the Contract Act, any consideration under a void contract would be returnable by the company (in liquidation) to person from whom such consideration has flown becoming a debt payable by it. This is not to say that Section 536(2) applies to the loans procured or liabilities incurred by the company between the date of commencement of proceedings and the date of adjudication. To accept this part of the consequence would amount to saying that with effect from date of presentation of a winding up petition, company is precluded from carrying on its regular activities and is absolved from liabilities arising in the course of transacting such business as well. So far as depositing company's funds with the bank is concerned, by itself, the deposit does not amount to disposition of company's assets thereby creating any interest in such assets in third party. It is in fact a conversion of asset which was owned by the company in the form of cash which is now owned by the company in the form of FDR with the bank, as an actionable claim for money against the Bank as its debtor. In the process company becomes creditor of the

bank to the extent amount payable under FDR to it. The primary effect of the transaction is not withered away by the fact that the FDR has been utilised by the company (in liquidation) as valuable asset for providing security by creating charge for getting loan facility from the very same bank. The creation of charge, which results in disposing of the property in FDR may be hit by Section 536(2). The resultant position would be that creation of charge would be void, the status of the bank vis-a-vis the amount advanced on the security of FDRs would become an unsecured creditor of the company and it would be in the position of a simple debtor to the company in respect of the amounts payable under FDR. We are of the opinion, that this result is not affected by Section 536(2) whether transaction as a whole is taken or independent transactions of loan and FDRs are concerned.

50. It was vehemently urged by Mr. Mehta, learned counsel for the Official Liquidator that such set off will amount to fradulent preference of a credtior under Section 531 of the Act. Section 531 speaks about fraudulent preference. It reads as under:

"531(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being would up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

Provided that, in relation to things made, taken or done before the commencement of this Act, this subsection shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purposes of subsection (1), the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual"

51. Without anything more a fraudulent preference means discharge of an existing liability or an act on the part of insolvent which may result in a discharge of one liability over others to give the former a favourable treatment, which under the provisions of Insolvency law is considered a fraudulent preference. A fraudulent preference has a definite connotation. Section 531 clearly envisages that what shall be treated as fraudulent preference in case of an individual is adjudged as insolvent under the Insolvency law applicable to him shall be treated as a fraudulent preference of its creditors under the Companies Act also. Section 54 of the Act of 1920 which provides what is to be considered fraudulent preference. Section 54 of the Provincial Insolvency Act reads as under:

"54. Avoidance of preference in certain cases.

(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent."

52. A perusal of the aforesaid provision clearly goes to show that a discharge of debt by the company (in liquidation) within the period prescribed by itself is not deemed to be fraudulent. The fraudulent preference emanates from intention of the insolvent of giving a preference over the other creditors. That is to say, the element of intention on the part of insolvent at the time of discharging debt is the question which determines whether the discharge of debt within the period of six months before the presentation of winding up petition in the case of company amounts to a fraudulent preference. The fact that it results in preferential treatment by itself is not sufficient to brand the transaction as a fraudulent preference.

53. Law has been well settled that to establish

fraudulent preference under Section 531 it is not enough to show that preference was shown to a particular creditor. It must also be shown that it was done with a view to give him preferential treatment. For the purpose of assuming a transaction as a fraudulent preference, the discharge of a debt within the stipulated period, namely six months before the presentation of petition for winding up is to be considered and what is to be considered is not the incurring of the debt, but the payments made to discharge that debt. Mere discharge of debt resulting in preference will not make it fraudulent. Such discharge of debt must be coupled with intent to give such creditor a preferential treatment. We have already assumed the transactions of pledging the FDRs for the present purpose to be void under Section 536(2). Independent of it, we have not been shown that any debt has been discharged by the company whether six months before the filing of the petition or after the filing of the petition in any manner whatsoever. It is not the case, either that a debt was pre-existing and the deposits with the bank were merely a camouflage to discharge those existing debts with a view to raise the plea of set off in case winding up is ordered, but in fact it constituted payment of debt. In fact this intention on the part of company (in liquidation) to make a preferential payment was neither raised nor argued at any stage of the proceedings. What really has been contended is that if the set off under Section 46 of the Act 1920 is allowed, it would result in fraudulent preference. This contention in our opinion, must fail on the ground that the provision of set off is statutory provision and it has been enacted with the object which we have already discussed above and the provision which has been found to have a mandatory character in it that in respect of a person who stands vis a vis the company as a creditor and also as a debtor, only the balance amount should be taken into consideration and nothing more. A result which flows from statutory provision in our opinion can never be attributed as intended act of the insolvent which can be branded as a fraudulent preference. In giving effect to provision of law, intention of company (in liquidation) or the insolvent never comes into play.

54. We may refer in this connection a decision of the Madras High Court in K. Anantaraman v. James Voce Pirrie and Cyril Gill AIR 1940 Madras 157. Question had arisen in the circumstances that there was no dispute between the parties that though a debt not presently payable can be set off against moneys owed to the company (in liquidation) and there was also no dispute that if

there was a valid assignment, in favour of the creditor, of a FDR with the bank, the same could be set off against the debt. The question was raised that if the amount is allowed to set off, it would amount to a fraudulent preference. The court, rejected the plea, by holding that the contention was unsound albeit on fact, it was found that there was no assignment creating a mutual debt in favour of the bank which was standing in somebody else's name.

55. Without there being a payment and without there being an intention on the part of insolvent of the company (in liquidation) at the time of making payment or discharging the debt to prefer a creditor over others, the question of fraudulent preference would not arise by operation of Section 46 which gives right to an unsecured creditor of the company as well as company (in liquidation) to set off outstanding against each other and to act according to the balance remaining outstanding whether resulting in company becoming ultimately a creditor or a debtor. There shall remain between the same parties only one status. If the company ultimately ends up the debtor, vis a vis the claimant, he will be entitled to prove only the debt to that extent. If on the other hand on balance the claimant becomes debtor of the company (in liquidation), the insolvent or the company shall have a right to recover only that much amount which is outstanding in balance. Howsoever wide meaning may be given to the expression `other act relating to property' under section 531 of the Companies Act, it must have reference to discharge of a debt and not with reference to right of the parties and to claim set off in respect of existing claims against each other. Mere exercise of that right cannot amount to fraudulent preference within the meaning of Section 531 or Section 531A read with Section 54 ofthe Act, 1920. The question of fraudulent preference also cannot depend on the fact whether the demand is made by the creditor of the company (in liquidation) or a demand is first made by the company (in liquidation) in respect of its claim and the set off is pleaded by the company's debtor in respect of amounts due from the company to it. In the present circumstances, obviously, had the Bank demanded for payment of sum due to it under overdraft, the company (in liquidation) was entitled to claim set off against the amount due under FDRs notwithstanding that the same were not hypothecated as security for discharge of the debts due. If that could be done, we see no reason, why the bank could not claim the set off because the company (in liquidation) has taken initiative to call upon the bank to pay the amount due under the FDRs.

56. Buckley on Companies Act (13th edition) says at p. 635:

> "Where a company is being wound up, whether an action is brought by the company or a proof is carried in by creditor of the company in the winding up, a set off of a liquidated sum was always admissible."

57. On the aforesaid premise, we are of the opinion, that the appellant must succeed in this appeal, on the ground that he is entitled to claim set off its dues from the company (in liquidation) against the account which is payable by it under the FDRs, as on date of order of winding up payable to the company. As we are not called upon here to decide upon the final balance that works out on determining the amount payable under each claim and which is to be determined by the Official Liquidator or in any other proceedings that may be taken in that regard as to the actual amount, due under both the transactions and on set off against each other how much amount remains payable by the company (in liquidation) or to the company (in liquidation) as the case may be. That of course will have to be determined subject to directions already made in Company Application No. 146 of 1997.

58. We therefore hold that the appellant bank is entitled to claim set off of amount recoverable by it under the overdraft account against any sum which is payable by it to the company (in liquidation) whether under the FDRs referred to above or the amounts standing in credit in company's different accounts with it.

59. The appellant cannot secure more benefit than this even if the transaction of creating charge by pledging the FDRs with the bank as security for repayment of dues under overdraft account is validated which are otherwise void, to the extent it exceeds Rs.3,75,000/-, We do not further pursue the enquiry whether in the facts and circumstances of the present case, the transactions of creating security since July 1975 in favour of the bank need be validated. The question become academic.

60. The contention of the learned counsel for the appellant that it is otherwise entitled to realise from the FDRs available with it because of the lien it holds in respect of Section 171 is only stated to be rejected. A plain reading of Section 171 of the Indian Contract Act goes to show that it applies only in case of goods bailed to bankers, wharfinger etc. but does not apply to FDRs

which are actionable claims, cannot in any sense be termed as a goods, bailed to the company, within the meaning of Section 171 of the Contract Act.

61. As a result, this appeal is allowed. The order under appeal is set aside, and we hold that in terms of Section 46 of the Provincial Insurance Act 1920 read with Section 529 of the Indian Companies Act 1956 the amount payable by the appellant Bank to the company (in liquidation) on various accounts including under various FDRs referred to above which is debt owed by it to the company (in liquidation) has to be set off towards repayment of monies due by the company (in liquidation) to the bank under the overdraft account which is debt owed by the company (in liquidation) to the Bank as on the date of winding up order, which is a debt provable under Section 529 of the Act of 1956 read with Section 34 of the Act of 1920. The company (in liquidation) shall be liable to pay or receive only the balance amounts due as on the date of winding up order as a result of such set off, under Section 46 of the Act of 1920.

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62. In these two appeals, the question raised to be decided is whether the renewal of the FDRs is to be directed now. This brings into question as to what ought to be the date on which set off is to take place. Section 46 of the Provincial Insolvency Act, 1920 reads as under:

> "46. Mutual dealings and set-off. - Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

63. A reading of this Section makes it abundantly clear that whether to claim or not to claim the set off envisaged under insolvency law in respect of an individual or for that matter in winding up proceedings in the case of a company to which such insolvency law applies is not a matter of option given to the insolvent as is open to a party to ordinary suit under general law. Independent of insolvency proceedings, a person against

whom claim has been made by another and he too has a claim against such suitor, he has option either to plead set off in defence, or to lodge a counter claim in those very proceedings or independent of those proceedings prosecute his own remedy in respect of his own claim. But when the situation arises about making a claim, where one of the claimants has been adjudged insolvent or a company which has been ordered to be wound up, the setting off each other claim is not matter of choice, but is subject to statutory mandate. Section 46 requires as a matter of law that mutual dealings between the insolvent and a creditor shall be set off and the BALANCE OF THE ACCOUNT AND NO MORE shall be claimed or paid on either side respectively. This leaves no room of doubt that requirement of Section 46 to set off of claims arising out of mutual dealings is a requirement at the time claim is made by or against the company (in liquidation).

64. Set off being the mandatory requirement enquiry takes us to Section 34 of Provincial Insolvency Act which is applicable in the matter of debts provable in winding up proceedings as per Section 529 of the Companies Act. Section 34 reads as under:

> "34. Debts provable under the Act. - (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.
>
> (2) Save as provided by subsection (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge my reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

65. The perusal of the aforesaid provision shows that the crucial date with reference to which the debt is to be proved is the date of adjudication of an individual as insolvent or the order of winding up in the case of company. `All debts to which the debtor is subject when he is adjudged an insolvent' are key words as to the date with reference to which debt is to be proved. The fact that the liability may be present or future only goes to show that notwithstanding that the debt is not payable in

presenti, if an obligation in that respect has arisen prior to the date of adjudication, the existing liability against such claim as on the date of adjudication, is a debt provable under the Act. This is further corroborated from the fact that interest payable in respect of such debt under Section 48 of Act of 1920 is also to be calculated at the rate envisaged thereunder after adjudication until the date of payment. With these two premises, that requirement of set off under Section 46, if mutual dealings exist resulting in a debt payable and a debt receivable, is mandatory under statute and debt payable by the company is to be determined as on the date of adjudication. The final sum payable by the company on the date of winding up order is subject to statutory provision as to rate of future interest with effect from the date of winding up order. The amount on which such interest is to be calculated must be ex hypothesi determined as on the date of adjudication or the date of winding up order, as the case may be.

66. In conclusion to which we have reached we find support in a decision of Calcutta High Court In the matter of The Pioneer bank Ltd., & B.N. De and others 1951 Cal 519 Bachawat, J, as he then was, opined:

> "The equivalent of adjudication in the case of a Co. is the order for winding up. The right of proof and set off in the case of an insolvent Co., in the course of winding up in a Presidency Town must therefore be defined and ascertained as at the date of the order of winding up."

67. The court relied on the following opinion of Wright J., in Re Daintrey, (1900) 1 Q.B. 546 at p. 555 giving cogent reason why the same dividing line should be taken for the purpose of ascertainment of the date of set-off:

> "Prima facie it would seem that the line which is drawn for defining what debts are to be provable in the bankruptcy must be also the line for defining what cross claims are to be set off in the case of a creditor whose set off is not stopped at an earlier date by notice of an act of bankruptcy. If the line were to be drawn at different times for the two purposes of proof and set off the result might be unjust."

68. Once we reach this conclusion that the bank in question is entitled to set off, its claim in overdraft account against the amounts payable under the FDRs to the

company in liquidation the further conclusion is irresistible, that claim against the company in liquidation must be set off against dues from the company as on the date of the winding up order and its dealing in future with effect from that date depend on whether any amount is found payable to the company in liquidation by the bank or vice versa, and it shall be confined to such balance only. That being the position, and it being nobody's case that as on the date of winding up any of the claims were barred by time, the contention raised on behalf of the bank about debt payable by it under FDRs has become barred by time subsequently is wholly irrelevant and does not arise for consideration at all. The question would only be that in case on such set off anything is found payable by the bank to the company, the bank may be called upon to pay that sum to the Official Liquidator. That will arise only when the question of set off is determined and balance is found out. The question of renewal of FDR or making any demand on the bank in respect of their encashment at this stage has no bearing on the question of limitation. As on today, the claims of set off have not been determined and are yet to be determined under the provisions of law.

69. As a result of aforesaid discussion, these two appeals are disposed off with direction to the bank that bank shall within six weeks, prepare account of balance payable or receivable by it as on the date of winding up order to the Official Liquidator for his verification. The Official Liquidator shall verify such claim within a further period of six weeks. If as a result of such verification any sum is found payable by the bank to the company in liquidation, the bank shall pay the said amount with contractual rate of interest on the last of its FDR within a period of one month thereafter. On the other hand if anything is found payable by the company in liquidation to the bank on such balancing of account, the name of the bank shall be entered in the list of unsecured creditors to be dealt with in the matter of distribution of dividends in accordance with law. The determination of such account by the Official Liquidator shall be subject to right of the aggrieved parties to have recourse to such remedies, as are available to them under law.

With the aforesaid directions, these appeals and the company applications out of which the appeals have arisen are disposed of accordingly.

In the facts and circumstances of the case, there shall be no order as to costs in each of the appeals.

(Rajesh Balia, J)

(A.R. Dave, J)